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6 Attorneys for Plaintiff
7 THE SAN DIEGO UNION-TRIBUNE, LLC

8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10
11 THE SAN DIEGO UNION-TRIBUNE,
12 LLC, a Delaware limited liability
company,

13 Plaintiff,

14 v.

15 SHOUTBACK CONCEPTS, LLC, dba
16 CLICK-N-SHOUT, an Ohio limited
liability company, and DOES 1-50,
17 inclusive,

18 Defendants.

Case No. '11CV0941 JAH CAB

COMPLAINT FOR BREACH OF
CONTRACT

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SANTA MONICA, CALIFORNIA 90401-2386

1 Plaintiff The San Diego Union-Tribune, LLC for its complaint against
2 Defendants Shoutback Concepts, LLC dba Click-N-Shout alleges as follows:

3 **THE PARTIES**

4 1. Plaintiff The San Diego Union-Tribune, LLC (“Plaintiff” or “Union-
5 Tribune”) is a Delaware limited liability company with its principal place of
6 business in San Diego, California.

7 2. Defendant Shoutback Concepts, LLC dba Click-N-Shout
8 (“Defendant” or “Shoutback”) is an Ohio limited liability company with its
9 principal place of business in Cleveland, Ohio.

10 3. The true names and capacities of the defendants identified as Does 1
11 through 50 are unknown to Union-Tribune which therefore sues these defendants by
12 such fictitious names. Union-Tribune is informed and believes and, based thereon,
13 alleges that each of the DOE defendants was the agent of each of the other
14 defendants herein, named or unnamed, and thereby participated in some or all of the
15 wrongful conduct alleged herein. Union-Tribune is informed and believes and,
16 based thereon, alleges that each such fictitious defendant is responsible for the acts
17 or other wrongful conduct and is sued herein for that reason. Because the true
18 names and capacities, whether individual, corporate, partnership, or otherwise, of
19 defendants Does 1 through 50 are not known to Union-Tribune at this time, Union-
20 Tribune will seek leave of this court to amend this Complaint to allege their true
21 names and capacities as soon as it is able.

22 **JURISDICTION AND VENUE**

23 4. This Court has diversity jurisdiction pursuant to 28 U.S.C. § 1332(a)
24 (1). Specifically, Plaintiff Union-Tribune is a Delaware limited liability company
25 with its principal place of business in San Diego, California. Defendant Shoutback
26 is an Ohio limited liability company with its principal place of business in
27 Cleveland, Ohio. The amount in controversy exceeds \$75,000.

28 5. Venue in this district is proper under 28 U.S.C. § 1391(b) because a

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1 substantial part of the events giving rise to the claims alleged herein occurred in this
2 district. Further, Union-Tribune's principal place of business is located in this
3 district, Defendants purposefully established contacts within the State of California
4 and in this district and such contacts caused Union-Tribune the harm alleged in this
5 Complaint.

6 **FACTUAL BACKGROUND**

7 6. *The San Diego Union-Tribune* is a daily newspaper published in San
8 Diego, California, by plaintiff Union-Tribune. The newspaper is the result of a
9 February 2, 1992 merger of The San Diego Union, founded October 10, 1868, and
10 the Evening Tribune, founded December 2, 1895. It is one of the oldest businesses
11 in San Diego.

12 7. *The San Diego Union-Tribune* is ranked twenty-third in the United
13 States by daily circulation for the six month period ending September 30, 2010, with
14 a daily print circulation of 224,761.

15 **THE "SIGNON SAN DIEGO" DAILY DEAL**

16 8. In addition to print publication of the newspaper, Union-Tribune also
17 offers news and other information and services over the internet at
18 <http://www.signonsandiego.com> (the "Website"). Union-Tribune uses this Website
19 as its primary internet presence, causing other Union-Tribune-owned domain names,
20 including <http://www.sandiegouniontribune.com>, to redirect users to the Website.
21 There are approximately 3.2 million online users of the Website.

22 9. Union-Tribune also offers special services to users of the Website
23 including, without limitation, information about special events occurring in the
24 greater San Diego area and other opportunities for consumers with featured Union-
25 Tribune advertisers or other businesses. These services have been, and continue to
26 be, made accessible to online users who subscribe to Union-Tribune's opt-in e-mail
27 subscription service. As of February 2010, Union-Tribune maintained an opt-in e-
28 mail list of approximately 80,000 customers from the Website plus another 90,000

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1 e-mail addresses for customers of its home delivery service of the newspaper.

2 10. In 2009 and 2010, Union-Tribune began receiving inquiries from its
3 established advertisers as to whether it could provide a social media marketing
4 program similar to Groupon and Living Social due, in part, to the meteoric rise of
5 such business models and the substantial benefits conferred on participating
6 advertisers. Due to its extensive and ongoing relationships with local advertisers
7 and its pre-existing database of consumer e-mail addresses, Union-Tribune was
8 uniquely well-situated to implement a locally-focused social media marketing
9 program.

10 11. As a result, Union-Tribune began plans to launch a social media
11 marketing program through a Daily Deal e-mail service to be called the “SIGNON
12 SAN DIEGO” Daily Deal. (the “SIGNON SAN DIEGO” Daily Deal). Union-
13 Tribune immediately recognized the opportunity to provide the “SIGNON SAN
14 DIEGO” Daily Deal because Union-Tribune already enjoyed well-established
15 credibility with the San Diego community and it had the ability to promote the Daily
16 Deal both on the Website, on the right hand corner of every issue of the print edition
17 of the newspaper publication and through other means.

18 12. Union-Tribune began investigating potential vendors to provide
19 services in connection with its planned “SIGNON SAN DIEGO” Daily Deal.
20 Specifically, it sought a provider that could offer—for Union-Tribune’s benefit—a
21 number of services including, without limitation, platforms and tools to deploy the
22 content of the marketing program, credit card transaction processing, and advertiser
23 and customer tracking capabilities.

24 13. In February of 2010, Union-Tribune became aware of, and
25 subsequently contacted, the defendant Shoutback to explore whether it had the
26 capabilities to provide the necessary technology and other services to support
27 Union-Tribune’s launch of a “SIGNON SAN DIEGO” Daily Deal.
28

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THE OUTSOURCE SERVICES AGREEMENT

14. On February 26, 2010, Union-Tribune entered into an outsource services agreement with Shoutback (the “Outsource Services Agreement”), which contemplated that Union-Tribune “shall utilize its resources, subscription lists, membership lists, and marketing, sales and promotion staff to identify, solicit and enroll persons and entities to utilize the programs administered by Click-N-Shout for the users o[f] the clicknshout.com/signonsandiego website and readers of [Union-Tribune] publications.” A true and correct copy of the Outsource Services Agreement is attached hereto as Exhibit “A” and incorporated herein by this reference.

15. Under the terms of the Outsource Services Agreement, Shoutback agreed to provide the platform for the “SIGNON SAN DIEGO” Daily Deal program as well as perform other support service functions for Union-Tribune’s benefit. These services included, without limitation, the processing of transactions and collection of funds from individuals who purchased “SIGNON SAN DIEGO” Daily Deal offers. Upon collection of such funds, Shoutback was further charged with delivering the proceeds to Union-Tribune after deducting certain agreed upon service fees.

16. The Outsource Services Agreement provided that “[t]he term of this Agreement shall be one (1) year commencing on the date all parties execute this Agreement, and shall continue thereafter until terminated by either party hereto upon written Notice to the other parties, delivered not less than one (1) month before the date of termination.”

SHOUTBACK’S BREACH OF THE OUTSOURCE SERVICES AGREEMENT

17. On March 1, 2011, Union-Tribune delivered to Shoutback a Notice of Termination, which terminated the Outsource Services Agreement effective April 1, 2011. A true and correct copy of the Notice of Termination is attached hereto as

1 Exhibit “B” and incorporated herein by this reference.

2 18. Pursuant to the Outsource Services Agreement, once Shoutback had
3 deducted its service fees, it was obligated to deliver to Union-Tribune the revenues
4 collected from Union-Tribune customers purchasing “SIGNON SAN DIEGO”
5 Daily Deals in the prior month. [See Outsource Services Agreement, Exhibit A,
6 page 3]

7 19. On April 19, 2011, after multiple requests from Union-Tribune,
8 Shoutback provided Union-Tribune with a reconciliation for the month of March
9 2011 which, by Shoutback’s own admission, reflects that it still maintains
10 possession and control over \$573,167.18 that belongs to Union-Tribune.

11 20. Although Union-Tribune has made repeated demands for delivery of
12 such funds, Shoutback has failed and refused to delivery to Union-Tribune the
13 \$573,167.18, or any portion thereof.

14 21. As a direct and proximate result of the conduct of Shoutback, Union-
15 Tribune has suffered damages and the loss of its property in an amount to be
16 determined according to proof at trial.

17 **PRAYER FOR RELIEF**

18 WHEREFORE, Union-Tribune prays for judgment against Defendants, as
19 follows:

20 (1) Judgment in favor of Union-Tribune for damages in an amount to be
21 determined upon proof at trial which shall equal or exceed the \$573,167.18 of
22 Union-Tribune funds that Shoutback has failed and refused to deliver;

23 (2) Award Union-Tribune its costs, expenses, pre and post judgment
24 interest and any and all such other relief as it may be entitled to; and

25 ///

26 ///

27 ///

28 ///

(3) For such other and further relief as the Court may deem proper and just.

Dated: May 2, 2011

Respectfully submitted,

BRYAN CAVE LLP

By: s/Keith D. Klein

KEITH D. KLEIN

Attorneys for Plaintiff

THE SAN DIEGO UNION TRIBUNE, LLC

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EXHIBIT A

AGREEMENT

This AGREEMENT between The San Diego Union-Tribune, LLC., a Delaware limited liability company ("Union-Tribune") and Shoutback Concepts, LLC, dba Click-N-Shout, an Ohio limited liability company ("Shoutback") made this 26 day of February 2010.

RECITALS

(i) Shoutback provides an interactive online resource on the World Wide Web consisting of information services, content and transaction capabilities provided by Shoutback and its affiliates;

(ii) Shoutback makes a website available under the name "Click-N-Shout";

(iii) Union-Tribune desires to engage Shoutback to make Click-N-Shout available to users of the signonsandiego.com website and other promotional means utilized by the Union-Tribune

(iv) Shoutback shall make its Click-N-Shout website available to signonsandiego.com and its users to promote and provide deals on products and services (the "deals") at lower than market prices if enough buyers of the deals buy the deals within the time specified on the clicknshout.com/signonsandiego website;

(v) The parties hereto desire to memorialize their agreements concerning Click-N-Shout, and any other arrangements to make Click-N-Shout services available to users of the website of signonsandiego.com and other promotional means utilized by the Union-Tribune.

NOW, THEREFORE, the parties in consideration of the promises contained herein, agree as follows:

1. Services. Shoutback shall provide the following services to support

services for the users of the signonsandiego.com website and other promotional means used by the Union Tribune.

- (a) Services to facilitate the administration of the Click-N-Shout program for users of signonsandiego.com and other promotional means utilized by the Union-Tribune;
- (b) Platforms and tools to deploy the content of signonsandiego.com utilizing the services of Click-N-Shout and other promotional means utilized by the Union-Tribune;
- (c) Systems to guide users through the content of the Click-N-Shout program for users of clicknshout.com/signonsandiego;
- (d) The secure processing of buyers credit card transactions;
- (e) Response to inquiries concerning the foregoing;
- (f) Provide all administration for the first sixty (60) days of the term of this Agreement for the deals at no cost to Union Tribune, and thereafter Union Tribune shall have access to the deal administration panel and tools to input deals or upon Notice to Shoutback, Shoutback shall continue to provide deal administration for a fee of thirty-five dollars (\$35.00) per deal.

2. Duties of Union-Tribune and Shoutback. Union-Tribune shall utilize its resources, subscription lists, membership lists, and marketing, sales and promotion staff to identify, solicit and enroll persons and entities to utilize the programs administered by Click-N-Shout for the users or the clicknshout.com/signonsandiego website and readers of Union Tribune publications. Shoutback shall provide customer service Monday through Friday from 9:00 a.m. to 5:00 p.m. EST, and shall provide transaction data to all merchants offering deals on the clicknshout.com/signonsandiego website.

3. Fees. Shoutback shall pay to Union-Tribune fees in monthly amounts equal to the excess of the revenues collected over the lesser of seven and one-half percent (7½%) of the revenues collected from users accessing clicknshout.com/signonsandiego in the San Diego market or twenty percent (20%) of fees payable to Union-Tribune hereunder, less (i) payments by Shoutback of the greater of three percent (3%) or 50 cents per credit card transaction; (ii) 3 cents per e-mail to the extent provided by Shoutback, and (iii) any deal administrative fees as described above in paragraph 1(f) (and excluding from revenues Clique Bucks as described in the Click-N-Shout website). Within fifteen (15) days after the end of each month during the term hereof, Shoutback shall provide Union-Tribune a reconciliation of fees and expenses for the preceding month, and pay to Union-Tribune the share of revenues described above.

4. Term. The term of this Agreement shall be one (1) year commencing on the date all parties execute this Agreement, and shall continue thereafter until terminated by either party hereto upon written Notice to the other parties, delivered not less than one (1) month before the date of termination.

5. Confidentiality.

- (a) Union-Tribune hereby recognizes and acknowledges that: (i) in the course of its relationship with Shoutback, it will be necessary for Union Tribune to acquire certain confidential and proprietary data and trade secrets, including, but not limited to, the education and training provided to their personnel, proposals, pricing and pricing strategies, sales and marketing strategies, computer and internet programming and web site information and strategies, intellectual property ideas, business methods or practices,

research techniques training methods, programs and procedures and other confidential and proprietary customer and prospect information (collectively "Confidential Information") (ii) the Confidential Information is the property of Shoutback; (iii) the use, misappropriation or disclosure of the Confidential Information would constitute a breach of trust and could cause irreparable harm to Shoutback; and (iv) it is essential to the protection of Shoutback's goodwill and to the maintenance of Shoutback's competitive position that the Confidential Information be kept secret and that Union-Tribune not disclose the Confidential Information to others or use the Confidential Information to the advantage of Union-Tribune, or to the advantage of others.

- (b) Union-Tribune shall hold and safeguard the Confidential Information in trust for Shoutback, its successors and assigns and shall not, without the prior written consent of Shoutback, misappropriate or disclose or make available to anyone for use outside of the organization of Union-Tribune at any time either during the term of this Agreement or subsequent to its termination for any reason by either party.
- (c) Upon termination of this Agreement for any reason, Union-Tribune will promptly deliver to Shoutback all correspondence, data, software, files, letters, notes, notebooks, charges, diaries, sales logs, proposals, manuals and any documents concerning Shoutback's customers and, without limiting the foregoing, will promptly deliver to Shoutback any and all

other documents or materials containing or constituting Confidential Information, including all copies, variations, amendments or changes to the services or products of Shoutback made by Union-Tribune.

- (d) In the event that any provision of this Agreement is contrary to law in any applicable jurisdiction, the remaining provisions of this Agreement shall, nevertheless, remain in full force and effect, and such contrary provision is hereby modified to the extent necessary to comply with such applicable law, and shall be enforceable to the extent permitted by such law.
- (e) The obligations of Union-Tribune under this Agreement shall continue after the termination of this Agreement for any reason by either party, with or without cause, and shall be binding on successors and assigns of Union-Tribune and shall inure to the benefit of any successors and assigns of Shoutback.

6. Exclusivity. Until this Agreement is terminated by either of the parties hereto, Shoutback shall be the exclusive provider to signonsandiego.com of services which offer a deal a day requiring a certain number of buyers to make the deal available to the buyers and signonsandiego.com shall be the exclusive seller of deals in the San Diego market.

7. Applicable Law. This Agreement shall be governed by the laws of the State of New York and subject to the jurisdiction and venue of the state and federal courts located therein.

8. Notice. Any notice by either party desires or is required to give to the other party

shall be in writing and sent by postage-paid, first class certified mail, return receipt requested, to the address set forth below. Either party may change its address by notifying the other party of the change of address in writing pursuant to the provisions of this paragraph.

Notice to:

Union-Tribune: The San Diego Union-Tribune, LLC
P.O. Box 122512
San Diego, CA 92112-2512

Shoutback: Shoutback Concepts, LLC
6401 Davis Industrial Pkwy., Suite B
Solon, OH 44139

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date following the signature blocks below, and shall be effective as of the later of the two dates of execution.

THE SAN DIEGO UNION-TRIBUNE, LLC

By: 

Its: VP INTERACTIVE

SHOUTBACK CONCEPTS, LLC

By: 

Robert A. Scher, President

EXHIBIT B

The San Diego
Union-Tribune.

March 1, 2011

VIA FIRST CLASS CERTIFIED U.S. MAIL & ELECTRONIC MAIL

Robert A. Scher, President
Shoutback Concepts, LLC
23240 Chagrin Blvd., Suite 802
Beachwood, Ohio 44122-5404

Re: Notice of Termination

Dear Robert:

Please be advised that, as previously discussed, The San Diego Union-Tribune, LLC (Union-Tribune"), has elected, effective April 1, 2011, to terminate its agreement with Shoutback Concepts, LLC, dated February 26, 2010.

Sincerely,



Mike Hodges
VP Interactive

350 CAMINO DE LA REINA, SAN DIEGO, CA 92108
TELEPHONE 619-293-1108

0.7.77.3711

EXHIBIT B PAGE 14